STATE OF MICHIGAN

COURT OF APPEALS

MARLENE MARIE STAHL BROPHY, Plaintiff/Counter Defendant-Appellant,	UNPUBLISHED July 1, 2014
v	Nos. 314767, 316118 Charlevoix Circuit Court
TIM HERTLER, individually and d/b/a HERTLER CONSTRUCTION, Defendant/Counter Plaintiff-Appellee.	LC No. 11-068823-CZ

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In Docket No. 314767, plaintiff, Marlene Marie Stahl Brophy, appeals as of right the trial court's judgment in favor of defendant, Tim Hertler, individually and d/b/a/ Hertler Construction, on his counterclaim after a default judgment and a trial on damages.[1] In Docket No. 316118, plaintiff appeals as of right the trial court's amended judgment, which imposed case evaluation sanctions against plaintiff. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff lives in Grosse Pointe Shores and owns a second home on Deer Lake in Boyne City, which a fire destroyed in 2009. In May 2010, defendant submitted a bid of $24,000 to demolish the damaged remains of the lake house, clear the debris, and salvage items of value (doors, kitchen cabinets, countertops, etc.). After plaintiff's insurer, AAA, approved the bid, plaintiff hired defendant to do the work. On August 2, 2010, defendant billed plaintiff $21,840 for the demolition. On August 16, 2010, the parties entered into a written contract for defendant to rebuild the lake house. On September 25, 2010, plaintiff cosigned a $21,840 check from AAA to pay the August 2, 2010 invoice. Plaintiff said that she was reluctant to give defendant the check because the demolition work was not fully completed.

[1] This opinion will use the singular "defendant" and the pronouns "it" and "its" to refer to both defendant Hertler and Hertler Construction.

On November 2, 2010, defendant sent plaintiff a bill for $11,190.59 for construction work performed under the August 16th agreement. When plaintiff did not pay the bill, defendant filed and recorded a construction lien on the property on December 2, 2010. According to plaintiff, she hired another contractor to finish the cleanup of the property.

On August 1, 2011, plaintiff, proceeding *in propria persona*,[2] filed the instant action to remove defendant's lien against her property. She also sought reimbursement for the expense of the second contractor and the salvageable items that defendant did not return to her. Plaintiff alleged breach of contract, conversion, and misappropriation.

On October 31, 2011, defendant filed a counterclaim for breach of contract, foreclosure of the construction lien, implied contract, and unjust enrichment. Defendant sought payment of $11,190.56 for the November 2010 invoice under the contract and under the Construction Lien Act, MCL 570.1101 *et seq*.

A. PLAINTIFF'S DEFAULT ON DEFENDANT'S COUNTERCLAIM

When plaintiff did not timely answer the counterclaim, the trial court entered a default against her on December 5, 2011; the next day, plaintiff filed an answer to defendant's counterclaim. On January 17, 2012, defendant moved for entry of a default judgment as to the counterclaim. On February 7, 2012, plaintiff responded to defendant's motion for default judgment, asserting in an affidavit that she received the counterclaim on November 30, 2011 in a damaged envelope, and thus, could not timely respond to it.[3]

At the February 10, 2012 hearing on defendant's motion for default judgment, plaintiff again asserted that she received the counterclaim on November 30, 2011, in a damaged envelope, and thus, could not timely respond. The trial court asked plaintiff how it could not grant defendant's motion for a default judgment "when you're here today and you haven't filed a Motion to Set Aside the Default that's been entered against you?" Plaintiff responded that she had "the paperwork right here" and could "file today." The trial court then stated that "[u]nder the law, I can't even hear from you until you have this Default set aside." "I can't even consider what you're saying to me today when you're in a default status in terms of the [counterclaim] and that's because you've never filed a motion to set aside that default," the court advised. The trial court granted defendant's motion for a default judgment, noting that plaintiff had not taken any steps to have the default that was previously entered against her set aside, "which is what [she] should have done weeks ago," and further stated as follows:

> What you're asking me to do is to ignore the court rules and the law doesn't allow me to do that, and I'm concerned about your statement that you

[2] Plaintiff is a licensed attorney.

[3] Despite her assertion that she received defendant's counterclaim on November 30, 2011, plaintiff's signature on her answer to defendant's counterclaim was dated November 17, 2011.

> received—a damaged envelope on November 30th and yet signed—the Answer on November 17th.
>
> * * *
>
> You needed to [file a motion to set aside the default] in a timely fashion and you haven't. I can't rewrite the rules. And so everything you say today with regard to this Motion for a Default Judgment is not before me because you're defaulted, and I'm sorry that you didn't follow the rules, but I have to, so I'm gonna grant the Motion for a Default Judgment. . . . [S]o that's my ruling on this today. I don't see—how I can do anything else.

On February 23, 2012, plaintiff filed a motion to set aside the default judgment that the trial court had granted at the February 10 hearing, again asserting by means of affidavit that she could not timely respond to the counterclaim because she received it on November 30, 2011, in a damaged envelope.

On March 23, 2012, a hearing was held on plaintiff's motion. On the morning of the hearing, plaintiff faxed a new affidavit to the trial court that included additional statements that were not in the affidavit attached to her motion to set aside the default judgment. The trial court denied plaintiff's motion to set aside the default judgment, ruling as follows:

> MCR 2.603(B)(1) provides that a Motion to Set Aside a Default or a Default Judgment except when grounded on lack of jurisdiction over the defendant shall be granted only if good cause is shown in an Affidavit of Facts showing a meritorious defense is filed. The Motion to Set Aside the Default should have been filed long ago when we were here on the motion for the entry of the default judgment. So, that's a neglect for which I can find no reasonable excuse.
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> The Affidavit of Facts required in the court rule that accompanied this motion did not contain any Affidavit of Admissible Evidence of Facts and that's an excuse which I cannot find excusable neglect under the rule.
>
> The faxing of a second Affidavit—which doesn't indicate it's a second Affidavit—to the Court this morning is something that I cannot legitimately say is excusable neglect.
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> The *Huntington National Bank v Ristich* case cited in the brief at 292 Mich App 376, decided in 2011 by the Michigan Court of Appeals said that although the law favors the determination of claims on the merits, it also has been said that the policy of the state is generally against setting aside defaults and default judgments that had been properly entered. These were properly entered; I don't have a legal basis to set them aside so the motion is denied.

B. DEFENDANT'S REQUESTS FOR ADMISSIONS AND THE RESOLUTION OF THE CLAIMS CONTAINED IN PLAINTIFF'S COMPLAINT

On February 2, 2012, defendant served plaintiff with a set of requests for admissions pertaining to allegations in plaintiff's complaint. Plaintiff did not answer the requests for admissions, and on March 28, 2012, defendant filed a motion to deem the requests admitted. A hearing on the motion was scheduled for May 4, 2012. Plaintiff did not directly respond to the motion. Instead, on May 3, 2012, she sent to defendant and the trial court a document entitled, "motion to withdraw admissions"; she did not file the document with the clerk's office.

At the May 4, 2012 hearing, the trial court granted defendant's motion to deem the requests admitted, noting that plaintiff's untimely motion to withdraw her admissions was not properly before the court:

> . . . I've struggled to allow you to stay into this case for months on end; I've allowed a wide latitude of kind of skirting the rules, and there's been a history of non-compliance, and you're not even properly before me today. This Motion to Withdraw Admissions is not before the Court. I received it at 2:30 yesterday. And at that point it wasn't even filed with the Clerk and there was no motion fee paid. There's no Notice of Hearing. . . . And any motion has to be filed at least seven days before the hearing, and any response to a motion must be filed at least three days before the hearing, so I have no response whatsoever filed with regard to the defendant's motion, which is noticed before me today to deem these Requests for Admissions admitted and summary disposition as a result. . . . You've tied my hands. . . . [S]o I'm gonna grant the motion. I'm gonna grant the motion and that's my ruling.

Approximately three months later, on August 24, 2012, defendant moved for summary disposition as to the claims contained in the complaint, relying on plaintiff's admissions to support its request for summary disposition. On August 25, 2012, plaintiff filed a "second" motion to withdraw admissions, which was essentially identical to the May 3, 2012 motion.

On September 14, 2012, the trial court held a hearing on defendant's motion for summary disposition and plaintiff's motion to withdraw admissions. The trial court denied plaintiff's "second" motion to withdraw as untimely and granted defendant's motion for summary disposition.

C. BENCH TRIAL ON DAMAGES AND CASE EVALUATION SANCTIONS

On October 9, 2012, the trial court held a bench trial on damages with regard to defendant's counterclaim. In addition to the $11,190.59 that defendant alleged it was owed for construction-related damages, defendant sought $32,269.48 in attorney fees under the CLA and the parties' August 16, 2010 contract, which contained an attorney fee provision.

At the bench trial, the trial court heard the testimony of defendant's counsel, Joseph Quandt, regarding the reasonableness of the fees charges and the time spent on the matter, and various other factors. Plaintiff did not question Quandt regarding the attorney fees in general,

the hourly rate charged, the other attorneys who performed some of the work, or the reasonableness of the fees or any particular time entry. Her only argument was that the attorney fees were "four times more than what the damages were" and that she did not "know what this stuff [in the invoice defendant submitted] means."

On October 16, 2012, in a written opinion, the court awarded defendant the requested $11,190.59 in construction-related damages as well as $32,269.48 in attorney fees.[4] Accordingly, on December 28, 2012, the court entered a judgment in favor of defendant in the amount of $43,460.07. Plaintiff unsuccessfully moved for reconsideration. Plaintiff timely filed her claim of appeal in this Court on February 11, 2013 (Docket No. 314767).

On January 24, 2013, defendant filed a motion for case evaluation sanctions, seeking to recover the attorney fees incurred as a result of plaintiff's rejection of the case evaluation award.[5]

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[4] In regard to its award of attorney fees, the trial court held, as follows:

> The counter-plaintiff seeks reimbursement of attorney fees in the amount of $32,269.48 pursuant to Article 13 of the Construction Contract and the Michigan Construction Lien Act, MCL 570.1118. The counter-defendant disputes the reasonableness in view of the damage claim of $11,190.59. However, some of the attorney fees were generated in defense of the counter-defendant's complaint before another attorney came into the case. A substantial amount were incurred as a result of numerous motions noticed for hearing by the counter-defendant, many, if not most, without merit. The counter-plaintiff was forced to defend these motions, notwithstanding the amount of the counter-claim. The counter-defendant's many procedural errors over several months made this case much more complicated than reasonably necessary. The counter-defendant was given an opportunity at the evidentiary hearing to challenge the counter-plaintiff's evidence and to prevent [sic – present] any countervailing evidence. Instead, her only challenge was based on the amount of the claim for fees in comparison to the amount in controversy. Attorney Quandt testified that, but for these meritless motions, the attorney fee would have amounted to approximately a third of the total bill.
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> Attorney Quandt is recognized as a premier lawyer in Michigan, specializing in environmental and construction law. He was unable to engage in other work as a result of servicing Hertler Construction, a longstanding client of sixteen years. His hourly rate of $200 per hour is customary and reasonable in this area and is in accord with this Court's experience, the testimony of record, and the 2010 Economics of Law Practice Attorney Income and Billing Rate Summary Report produced by the State Bar of Michigan.

[5] Case evaluation took place on June 4, 2012. The panel entered an award of $0 on plaintiff's claims and $3,500 for defendant's counterclaims. Plaintiff rejected the evaluation. Defendant accepted the evaluation.

Specifically, the motion sought to recover attorney fees for the period of October 1, 2012, to the date the motion was filed, as the attorney fees incurred by defendant prior to October 1, 2012, had already been awarded by the trial court in its October 16, 2012 written opinion. Defendant sought an award of $16,581.55. Plaintiff responded to defendant's motion on February 8, 2013, the same day that the trial court held a hearing on the motion. In her response, plaintiff "object[ed] to all of" the attorney fees.

At the hearing, the trial court went through all of the time entries to which plaintiff orally objected, finding that some of the fees were not reasonable and accordingly struck attorney fees in the amount of $1,150. The trial court otherwise granted the motion and awarded case evaluation sanctions in the amount of $15,331.55. On April 26, 2013, the trial court signed an amended judgment that awarded defendant $11,190.59 in construction-related damages, $32,269.48 in attorney fees under the CLA and the parties' August 16, 2010 contract, plus $15,331.55 in case evaluation sanctions, for a total amended judgment in the amount of $58,791.62. On May 8, 2013, plaintiff timely filed a claim of appeal from that judgment (Docket No. 316118). On plaintiff's motion, this Court entered an administrative order consolidating the two appeals.

II. ANALYSIS

In her appeal brief, plaintiff raises a host of allegations of error pertaining to the default and default judgment on defendant's counterclaim, the trial court's rulings pertaining to defendant's requests for admissions, submission of the case to case evaluation, and the trial court's rulings with respect to damages and attorney fees.

A. THE DEFAULT AND DEFAULT JUDGMENT

Plaintiff argues that the trial court abused its discretion by not setting aside the default and default judgment. "[T]he decision to set aside a default judgment is a matter committed to the trial court's sound discretion and will not be reversed on appeal unless a clear abuse of discretion is shown." *Yenglin v Mazur*, 121 Mich App 218, 221; 328 NW2d 624 (1982). "A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

MCR 2.603(D) states, in pertinent part:

> (1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.
>
> * * *
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> (3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612.

MCR 2.612(C) states, in pertinent part:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
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> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.[6]

Sufficient "good cause" can be shown by (1) a substantial defect or irregularity in the proceedings upon which the default was based, or (2) a reasonable excuse for failure to comply with the requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233-234; 600 NW2d 638 (1999). The strength of the meritorious defense will affect the good cause showing that is necessary:

> When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Id.*]

Additionally, a counterclaim that does not state a cause of action cannot provide a legitimate basis for a default judgment. See *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981) ("If the complaint fails to state a cause of action, it will not support a judgment."). "Manifest injustice would result if a default was not set aside where the plaintiff failed to state a claim upon which relief can be granted, because a complaint that fails to state a cause of action cannot support a judgment." *Lindsley v Burke*, 189 Mich App 700, 702-703; 474 NW2d 158 (1991).

Plaintiff first argues that the trial court erred by failing to recognize and exercise its discretion with regard to the "oral" motion to set aside the default that she allegedly made during the February 10, 2012 hearing. Plaintiff also argues that the trial court erred by refusing to set aside the default judgment because the counterclaim failed to state claims upon which relief could be granted and because she received the counterclaim approximately ten days late, whereafter she immediately contacted counsel to indicate that an answer was forthcoming.

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[6] See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 234 n 7; 600 NW2d 638 (1999) (holding that the exception in MCR 2.612(C)(1)(f) "should not be read so as to obliterate the analysis we set forth regarding MCR 2.603(D)(1)" or else the "exception in MCR 2.612(C)(1)(f) could swallow the rule set forth in MCR 2.603(D)(1).").

We conclude that the trial court did not fail to recognize or properly exercise its discretion in denying plaintiff's attempt to set aside the default. Contrary to plaintiff's assertion, she did not make an oral motion to set aside the default. We have reviewed the hearing transcript and can find no indication that an oral motion was ever made. Moreover, even if plaintiff had made an oral motion to set aside the default, such a motion would be improper because MCR 2.603(D), the rule governing a motion to set aside a default, requires the filing of an "affidavit of facts showing a meritorious defense[.]" MCR 2.603(D)(1). Both of the affidavits plaintiff filed contained little more than a conclusory recitation of her belief in the merits of her claim. *Huntington Nat'l Bank*, 292 Mich App at 394 ("Defendant failed to present any evidence, other than his own unsupported assertion, that he could defend against plaintiff's claim."); *Novi Constr Inc v Triangle Excavating Co*, 102 Mich App 586, 590; 302 NW2d 244 (1980) (holding that the defendants' "affidavit was insufficient because it stated a mere conclusion and did not give a factual basis for that conclusion.").

Further, the trial court did not abuse its discretion in refusing to set aside the default judgment. Plaintiff has failed to demonstrate a meritorious defense. And, contrary to plaintiff's assertion, the counterclaim did state claims upon which relief could be granted. It stated claims for breach of contract, implied contract, and unjust enrichment, as well as for foreclosure under the CLA. There was nothing insufficient with regard to these claims. Despite plaintiff's assertions, defendant's counterclaim for breach of contract was not untimely under the terms of the parties' contract as the counterclaim was filed (on October 31, 2011) within one year of the event giving rise to defendant's breach of contract claim, i.e., plaintiff's nonpayment of the November 2, 2010 invoice. Nor was defendant's claim to foreclose on its construction lien untimely. Further, defendant's alternative counterclaims for implied contract and unjust enrichment were permissible notwithstanding the fact that defendant also brought a breach of contract claim based on the parties' express contract. MCR 2.111(A)(2); *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999) (explaining that a party is entitled to bring alternative claims).

Moreover, plaintiff failed to satisfy the good cause requirement by showing a procedural irregularity or defect or by giving a reasonable explanation for her filing failure. As the trial court noted, plaintiff's motion should have been filed long before it was filed, and there was no reasonable excuse for the delay in filing the motion. The trial court was also rightfully skeptical regarding the damaged envelope, believing that plaintiff filed her late answer to the counterclaim (on December 6, 2012) because she received a copy of the default (on December 5, 2012), not because of a damaged envelope. Plaintiff could not produce the damaged envelope. It is also curious, as the trial court noted, that plaintiff's signed answer to defendant's counterclaim is dated "November 17, 2011," yet she claimed not to have received the counterclaim until 13 days later on November 30, 2011.

Accordingly, we conclude that the trial court did not abuse its discretion by declining to set aside the default and default judgment.

B. REQUESTS FOR ADMISSIONS

Plaintiff argues that the trial court erred in granting defendant's motion to deem the requests for admissions admitted and abused its discretion when it failed to allow her to

withdraw her admissions at the May 4, 2012 hearing. "This Court reviews for an abuse of discretion a trial court's decision on a party's motion to amend its admissions under MCR 2.312(D)(1)." *Bailey v Schaaf*, 293 Mich App 611, 620; 810 NW2d 641 (2011), remanded in part on other grounds 494 Mich 595 (2013). "A trial court abuses its discretion when it selects an outcome that falls outside the range of principled outcomes." *Id.* Whether the trial court complied with a court rule is a question of law, which this Court reviews de novo. *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

> Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. [MCR 2.312(A).]

"A matter admitted under [MCR 2.312] is conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D)(1). The court may allow a party to amend or withdraw an admission for good cause. MCR 2.312(D)(1). The trial court's task is "balanc[ing] between the interests of justice and diligence in litigation." *Janczyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983).

Plaintiff first argues that the trial court erred as a matter of law in granting defendant's motion to deem the requests for admissions admitted because defendant's motion did not state that defendant had "in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action" as required by MCR 2.312(C). However, MCR 2.312(C) addresses a different situation than the one that occurred in this case. Specifically, MCR 2.312(C) concerns a situation where the parties have a dispute regarding whether the answering party's *actual answer or objection* to a request is sufficient. It does not address where a party fails to timely provide *any answer or any objection* to the requests.

Plaintiff next argues that the trial court failed to recognize that it had discretion under MCR 2.312(D)(1) to grant plaintiff an extension to file answers to the requests for admission. Plaintiff refers to the trial court's statement at the May 4, 2012 hearing that "[y]ou've tied my hands" as evidence that the trial court failed to recognize that it had this discretion. This argument is in error. The trial court's statement that "[y]ou've tied my hands" referred to plaintiff's failure to file a proper motion to withdraw admissions. As the trial court noted immediately before making this statement, plaintiff's motion to withdraw admissions was not received until the day before the May 4, 2012 hearing on defendant's motion to deem the requests admitted, was not accompanied by a motion fee, and did not contain any notice of hearing. The trial court's "hands were tied," it explained, because "any motion has to be filed at least seven days before the hearing, and any response to a motion must be filed at least three days before the hearing." See MCR 2.119(C). Although the trial court would have had the discretion to allow plaintiff to amend or withdraw her admissions had plaintiff filed a proper motion seeking that relief, as the trial court correctly recognized, such a motion was not properly before the court at the time of the hearing on defendant's motion to deem the requests admitted.

Plaintiff next argues that the "trial court erred as a matter of law and abused its discretion in ignoring the directive embodied in MCR 2.119(1) and by refusing to consider [plaintiff's] oral motion to permit her to withdraw or amend her answers deemed admitted or to receive an extension within which to file answers to the requests for admissions."[7] Plaintiff provides no citation to support her assertion, and our review of the hearing transcript did not uncover any such oral motion.

Plaintiff's final argument is that the trial court erred as a matter of law by not applying factors enumerated in *Janczyk*, 125 Mich App at 692-693, at the May 4, 2012 hearing and abused its discretion by refusing to allow plaintiff to withdraw her admissions. We disagree. The trial court did not abuse its discretion by failing or refusing to hear plaintiff's untimely and improperly filed written motion to withdraw admissions at the May 4, 2012 hearing. Likewise, because plaintiff did not make an oral motion to withdraw the admissions, the trial court could not have abused its discretion in that regard either. The trial court properly declined to hear plaintiff's motion because it had not been filed in accordance with the court rules. What was at issue during the hearing was defendant's motion to deem the requests for admissions admitted. The trial court did not abuse its discretion in deeming those requests for admissions admitted pursuant to MCR 2.312(B)(1). Absent a proper motion from plaintiff, the court had no obligation to consider whether plaintiff had good cause to set aside the admissions pursuant to MCR 2.312(D)(1) and *Janczyk*. See *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991).[8]

C. CASE EVALUATION SUBMISSION

Plaintiff asserts that the trial court erred as a matter of law by sending this case to case evaluation because the only claims that remained for case evaluation were for equitable relief under the CLA.[9] We conclude that plaintiff waived this issue by affirmatively requesting that the matter proceed to case evaluation. See *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002) (explaining that a party may not assign error to her own conduct and then "harbor[ ] error as an appellate parachute."). Plaintiff never filed an objection to the trial court's December 12, 2011 civil scheduling conference order, which ordered the case to case evaluation, or requested an adjournment of the case evaluation that was ordered. Rather, at the May 4, 2012 hearing on defendant's motion to deem the requests admitted, plaintiff specifically requested that the court send the case to case evaluation, stating "[l]et's go through case evaluation," "[t]hat's all I'm asking for."

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[7] Plaintiff cites MCR 2.119(A)(1) for the proposition that motions do not have to be in writing if made during a pending hearing.

[8] Plaintiff has limited her arguments to what occurred at the May 4, 2012 hearing. She does not argue that the trial court abused its discretion in denying her August 25, 2012 motion to withdraw admissions.

[9] See MCR 2.403(A)(1) ("A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.").

D. "DAMAGES" AND ATTORNEY FEES

Plaintiff argues that the trial court erred in its award of damages and attorney fees. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). This Court reviews "for an abuse of discretion a trial court's award of attorney fees and costs." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

Plaintiff first argues that the trial court erred in awarding damages because defendant's breach of contract and CLA claims lacked merit. Specifically, plaintiff asserts that these claims lacked merit because the parties' agreement, on which the breach of contract and CLA claims are based, contained an arbitration provision and a statute of limitation provision by which defendant failed to abide. We conclude that this argument has been waived because plaintiff never raised any statute of limitation or agreement to arbitrate as a defense or an affirmative defense in her answer to the counterclaim or in her separate pleading wherein she provided her list of affirmative defenses. MCR 2.111(F)(2) ("A defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . . ."); MCR 2.111(F)(3) (providing that "the existence of an agreement to arbitrate" and "statute of limitations" are affirmative defenses); *Kemerko Clawson, LLC v RXIV, Inc*, 269 Mich App 347, 351 n 2; 711 NW2d 801 (2005).[10]

Plaintiff next argues that the trial court erred by failing to consider whether defendant mitigated its damages, asserting that defendant failed to mitigate its damages by conducting work before obtaining a signature on its written agreement and by continuing to work after the written agreement was repudiated.

"The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc*, 256 Mich App at 512. "Damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact."

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[10] Moreover, we note that although plaintiff frames her argument in terms of the trial court's award of *damages*, (i.e., arguing that the trial court erred in awarding any damages because defendant breached the arbitration and statute of limitation provisions of the contract), her argument really concerns whether plaintiff is *liable* for breach of contract or under the CLA. That issue was conclusively determined when the trial court entered the default judgment. Plaintiff is attempting to recast an argument concerning contractual provisions, which clearly relates to liability, into an argument directed at damages, in an attempt to take a second bite at the liability issue. Additionally, we note that plaintiff's argument concerns only the breach of contract and CLA claims and fails to account for defendant's implied contract and unjust enrichment claims. Defendant was granted a default judgment on these claims as well, and plaintiff's argument does nothing to account for the trial court's ability to award damages pursuant to these claims.

McManamon v Redford Twp, 273 Mich App 131, 141; 730 NW2d 757 (2006). "Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998).

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided. [*Id*. at 263-264 (internal quotation marks and citations omitted).]

"In both contract and tort actions, the injured party must make every reasonable effort to minimize damages suffered." *Williams v American Title Ins Co*, 83 Mich App 686, 697; 269 NW2d 481 (1978). "It is the burden of the defendant, however, to show that the plaintiff has not used every reasonable effort within his or her power to minimize damages." *Id*.

Plaintiff's argument that defendant failed to "mitigate" its damages by conducting work before obtaining a signature on the parties' written agreement is mischaracterized. Although she characterizes it as "mitigation," plaintiff is actually arguing that defendant could not recover for the costs and expenses it occurred before the parties entered into the written agreement because the parties had no agreement at the time that defendant incurred these costs and expenses. First, plaintiff is overlooking the fact that the parties' agreement does not preclude damages for labor provided or services rendered before the contract was entered into. Second, plaintiff brought claims for implied contract and unjust enrichment and plaintiff's liability on these claims was established when the trial court entered a default judgment on defendant's counterclaim. The work performed before the parties memorialized their understanding in the August 16th agreement could properly be considered as damages under either of these claims.

Plaintiff's argument that defendant failed to mitigate its damages by continuing to work after the written contract was repudiated is also without merit. The foundation of plaintiff's argument is that she in fact repudiated the contract by means of an August 17, 2010 e-mail. However, the trial court found that "[t]he contract was not terminated by the language of the . . . email which was not in compliance with the termination provision of Article 14 of the Construction Contract." Plaintiff does not present any argument as to how the trial court erred in reaching this conclusion. She does not even mention that the trial court made this finding. She merely assumes that she repudiated the contract and then concludes that defendant failed to mitigate its damages by continuing to work after her repudiation.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then

> search for authority either to sustain or reject his position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).[11]

See also *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (refusing to review the plaintiffs' claim where, although they contended that "the trial court erred by dismissing their claim of promissory estoppel[,]" plaintiffs failed to discuss or dispute "the basis of the trial court's ruling.").

Plaintiff next argues that the trial court erred as matter of law and abused its discretion by failing to evaluate its award of attorney fees by reference to the analysis in *Smith*, 481 Mich 519, and erred as a matter of law by allowing a "premium" attorney fee for work that had been "bungled" by defendant's counsel and for work done by junior associates. Plaintiff also asserts that where the initial underlying claim was for $11,190.59, the trial court's award of $32,269.48 in attorney fees was grossly disproportionate and an abuse of discretion.

When a trial court awards attorney fees, the amount awarded is for reasonable fees, not actual fees. *Smith*, 481 Mich at 528 n 12 (noting that reasonable attorney fees are not equivalent to the actual fees charged). The party seeking the award bears the burden of establishing the reasonableness of the requested attorney fees. *Id*. at 528-529. In determining a reasonable attorney fee, the court must "begin its analysis by determining the fee customarily charged in the locality for similar legal services[.]" *Id*. at 530. "The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports[,]" *id.* at 531-532, or "other credible evidence of the legal market[,]" *id.* at 530-531.

After determining the fee customarily charged in the locality for similar legal services, the trial court should then determine the "reasonable number of hours expended in the case[.]" *Id.* at 531. The party seeking the award "must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness." *Id.* at 532. "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed . . . , the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Id.* at 532.

After determining the fee customarily charged in the locality for similar legal services and the reasonable number of hours expended in the case, the trial court must then take the fee customarily charged in the locality for similar legal services and multiply that number by the reasonable number of hours expended in the case. *Id.* at 531. "The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee." *Id*. From

[11] To the extent that plaintiff argues that the trial court "forbade" her from introducing evidence of mitigation, the portions of the bench trial transcript that she has cited to support this assertion do not indicate that she attempted to introduce any evidence that would go toward defendant's failure to mitigate damages. Rather, the testimony and evidence that she was attempting to introduce concerned her argument that there could be no damages because there was no contract at the time the costs and expense were incurred.

that starting point, the court "should consider the [*Wood v Detroit Auto Inter-Ins Exchange*, 413 Mich 573; 321 NW2d 653 (1982) and Rule 1.5(a) of the Michigan Rules of Professional Conduct] factors to determine whether an up or down adjustment is appropriate." *Id.* "[I]n order to aid appellate review, a trial court should briefly discuss its view of" these factors. *Id.*

Our review of the record indicates that the trial court sufficiently examined the factors required to determine a fee's reasonableness, and the record supports the court's findings. Our review of the record also reveals that plaintiff did not challenge any of the evidence that defendant presented with regard to the reasonableness of attorney fees. Consequently, we conclude that the trial court's findings were not clearly erroneous and that the trial court did not abuse its discretion when it awarded attorney fees.

E. CASE EVALUATION SANCTIONS

Plaintiff next argues that the trial court abused its discretion in its award of case evaluation sanctions.[12] In *Smith*, 481 Mich at 526, our Supreme Court set forth the standard of review applicable to an award of case evaluation sanctions as follows:

> A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. We review for an abuse of discretion a trial court's award of attorney fees and costs. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. [Citations omitted.]

If one party accepts the case evaluation award and the other party rejects it, and the case proceeds to a verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is, after several adjustments, more than ten percent more favorable to the rejecting party than the case evaluation. *Id.* at 527. In the instant case, the case evaluation panel entered an award of $0 on plaintiff's claims and $3,500 for defendant's counterclaims. Plaintiff rejected the evaluation and defendant accepted the evaluation. The case proceeded to a verdict, and the verdict was not more than ten percent more favorable to plaintiff than the case evaluation. In fact, the verdict was less favorable to plaintiff than the case evaluation. Thus, plaintiff was obligated to pay defendant's actual costs.

"Actual costs are defined in MCR 2.403(O)(6) as those costs taxable in any civil action and 'a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.' " *Id.*, quoting MCR 2.403(O)(6).

Plaintiff first asserts that the trial court failed to determine the fee customarily charged in the locality for similar legal services. Plaintiff states that "a review of the motion for sanctions,

[12] Defendant's award of attorney fees as a case evaluation sanction did not amount to a double-recovery, as defendant only sought a recovery of attorney fees that were incurred after its award of attorney fees based on the contract and the CLA.

its attachments and the transcript for the hearing indicates that [defendant] provided absolutely no affidavit, documentary evidence, or testimony regarding the fee customarily charged in Charlevoix County or northern Michigan nor did the trial court address the fees customarily charged in that location."

Contrary to plaintiff's contentions, defendant attached as an exhibit to its brief in support of its motion for case evaluation sanctions the State Bar of Michigan's 2010 Economics of Law Practice Attorney Income and Billing Rate Summary Report. That report provides attorney hourly billing rates for each county in Michigan. For Charlevoix, the 25th percentile billing rate is $200/hr; the 75th percentile billing rate is $225/hr; the 95th percentile billing rate is $275/hr; the median billing rate is $200/hr; and the mean billing rate is $211/hr. Given this report, and the fact that plaintiff did not specifically object to the hourly rate of $200 and did not present any evidence that this rate was greater than the rate customarily charged in the locality for similar legal services, plaintiff cannot show that the trial court abused its discretion by setting the hourly rate at $200. *Heaton v Benton Constr Co*, 286 Mich App 528, 542; 780 NW2d 618 (2009) (determination of the fee customarily charged in the locality for similar legal services is within the trial court's discretion).

Plaintiff next asserts that the trial court erred as a matter of law by failing to address the requisite factors when determining whether the attorney fees were reasonable. Although the trial court failed to discuss at the hearing on defendant's motion for case evaluation sanctions any of the factors required by *Smith*, 481 Mich at 531, the trial court had previously discussed these factors in its earlier award of attorney fees based on the parties' contract and the CLA. Given the trial court's earlier analysis of these factors, and given that plaintiff never raised any argument with regard to these factors, the trial court did not err in failing to address these factors for a second time at the hearing on defendant's motion for case evaluation sanctions. Any further discussion of these factors by the trial court would have been entirely repetitive.

Finally, plaintiff asserts that the trial court abused its discretion in its award of case evaluation sanctions because the amount of the sanctions was grossly disproportionate to the amount in controversy and because three of the fee entries allegedly relate to appellate preparation.

As to plaintiff's argument that the amount in controversy should have some bearing on the award of case evaluation sanctions, this argument has been specifically rejected by our Supreme Court. *Smith*, 481 Mich at 534 n 20 ("It would be inconsistent with MCR 2.403(O) to reduce the accepting party's reasonable attorney fees 'for services necessitated by the rejection' on the basis of the amount in question or the results achieved.").

Regarding plaintiff's argument that the trial court abused its discretion because some of the fees allegedly relate to appellate preparation, this argument is unpreserved because plaintiff failed to object to these fees during the hearing on defendant's motion for case evaluation sanctions and receive a decision from the trial court in regards to them. Although this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006), we decline to address this issue because the necessary facts have not been presented. In particular, these three entries to which plaintiff now objects are grouped with other

entries and we are unable to determine, without any testimony from defendant's attorney, what these entries represent.

Affirmed.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering